SURTASS LFA
A Case Study in Interagency Consultation

T&E Workshop

Winston-Salem, N.C.

23 March 2003

Overview

- For more than a decade Congress has raised concerns about interagency consultations
- More recently, NMFS has withstood numerous legal challenges to its biological opinions
- I will discuss these issues using our recent experience using SURTASS LFA as a case study

From Congress:

- Endangered Species Improvement Act
- Endangered Species Reform Act
- Sound Science for Endangered Species Act Planning Act 2001
- Sound Science Saves Species Act 2002
- Data Quality Act (section 515 of the Treasury and General Government Appropriations Act for Fiscal Year 2001)

From the Courts:

- Bennett v Spear
- PCFFA v NMFS (Rothstein I and II)
- Greenpeace v NMFS 1999, 2000, 2002
- Sierra Club v FWS and NMFS
- Blue Water Associates v NMFS
- NRDC v NMFS and U.S. Navy (pending)

Standards of Review 1

- Biological Opinions are “final agency” actions for the purposes of the APA
- As such, they are reviewed using the arbitrary and capricious standard of the APA
- In recent years, the focus of lawsuits associated with section 7 consultations has switched from Actions Agencies to the Services’

Standards of Review 2

- Normally, a Biological Opinion (or other final agency action) would be arbitrary and capricious if
  - we relied on factors which Congress has not intended us to consider,
  - we entirely failed to consider an important aspect of the problem

Standards of Review 3

- **Arbitrary and capricious (continued)**
  - **if we offered an explanation for our conclusion that runs counter to the evidence before us, or is so implausible that it could not be ascribed to a difference in view or the product of expertise, or**
  - **if we failed to articulate a satisfactory explanation for our conclusion**

Standards of Review 4

- Courts will base their review of biological opinions on the administrative record of the consultation that existed when the consultation concluded
- This presumes the existence of an administrative record that reveals the deliberative process we used to reach our conclusions

SURTASS LFA Sonar

The Issue Had Several Parts

- The consultation involved
  - The Navy's proposal to employ SURTASS LFA generally,
  - The Navy's proposal to employ SURTASS LFA in regions of the Pacific Ocean,
  - A regulation to authorize the "take" of marine mammals under the Marine Mammal Protection Act, and
  - NMFS' annual letters of authorization to "take" marine mammals under the MMPA

Definition

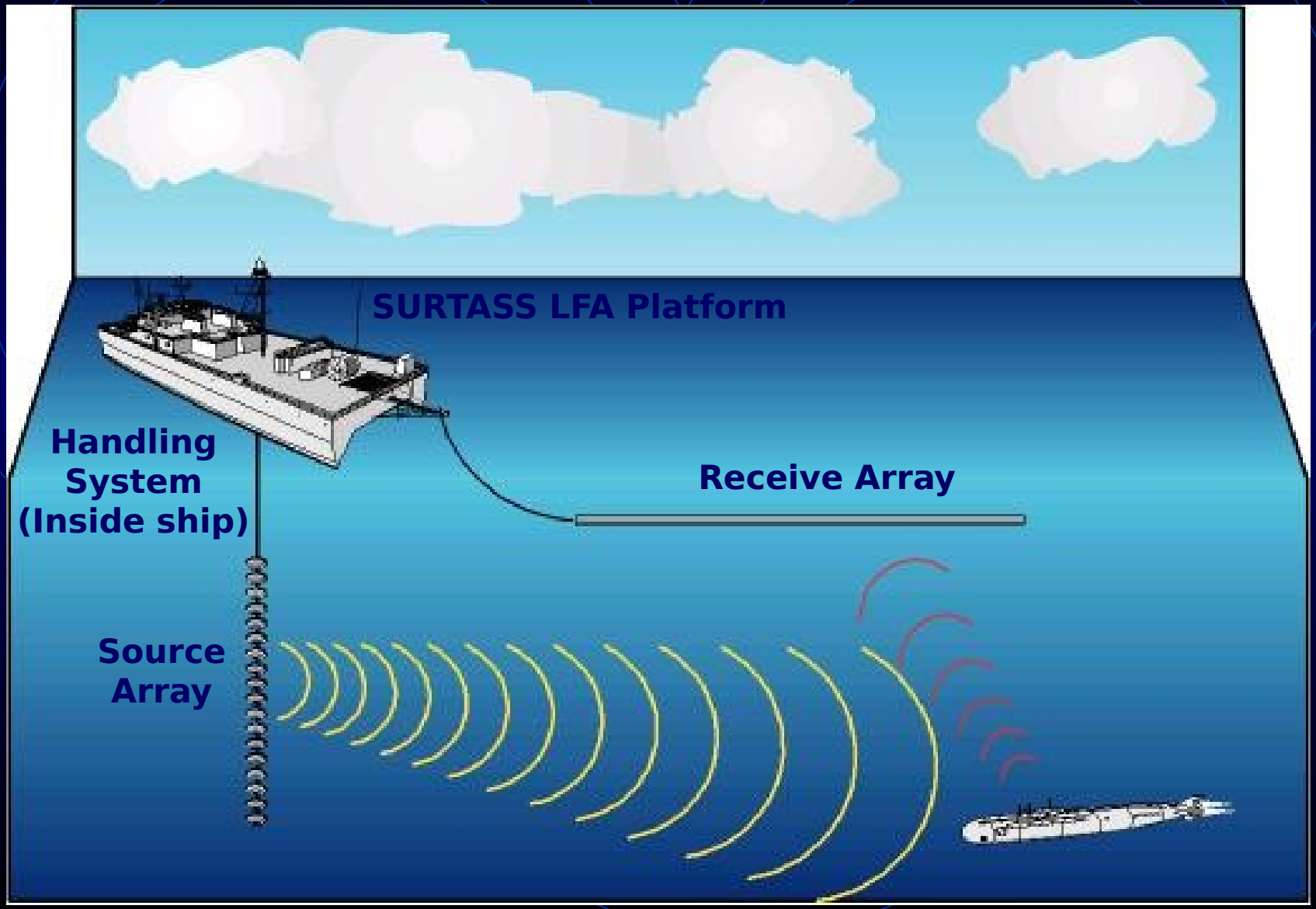
SURTASS

Surface Towed-Array Sensor System

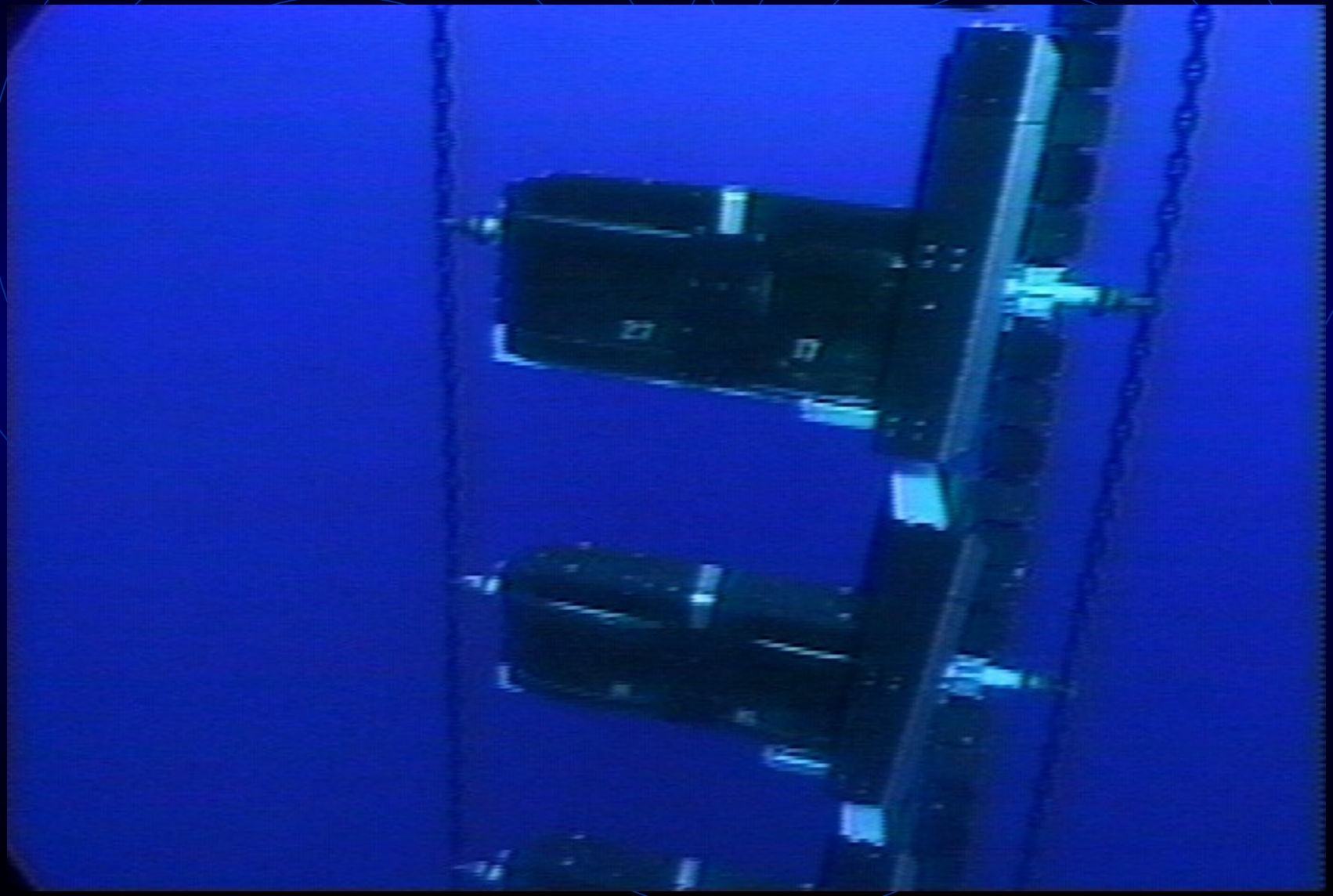
LFA

Low-Frequency Active

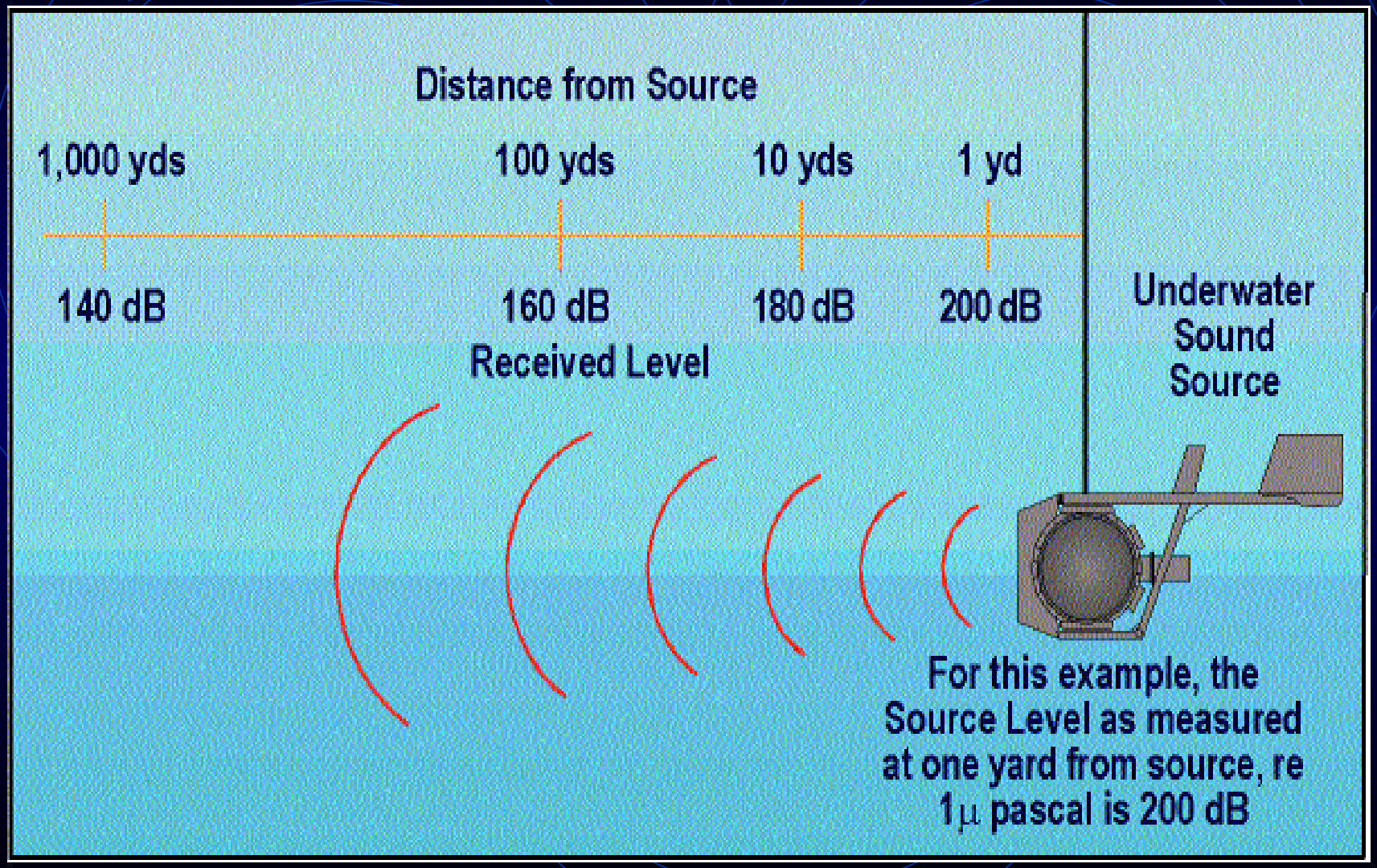
The System


SURTASS LFA Platform
Handling System (Inside ship)
Receive Array
Source Array

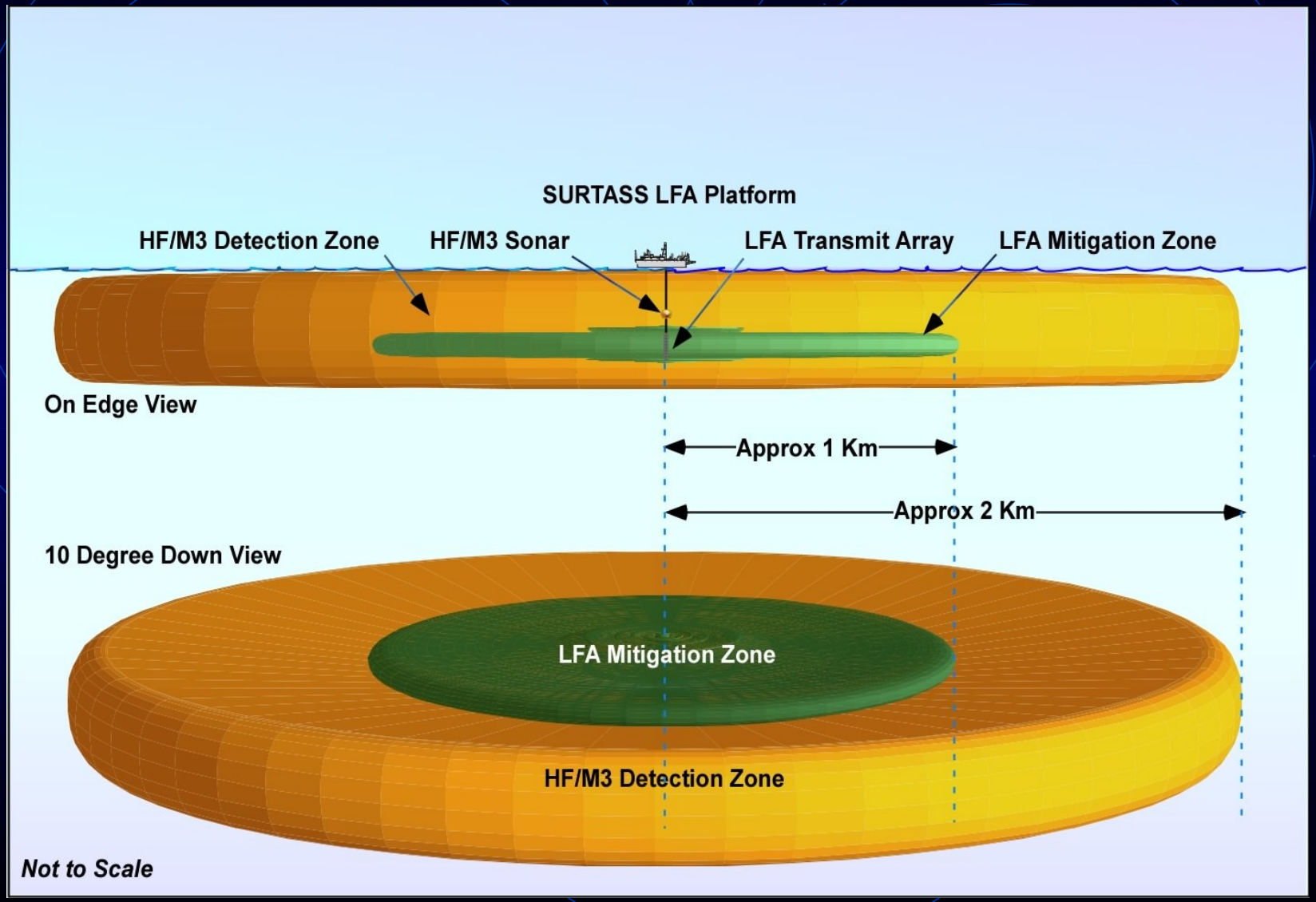
SURTASS LFA Transmit Array



Short Range Transmission Loss



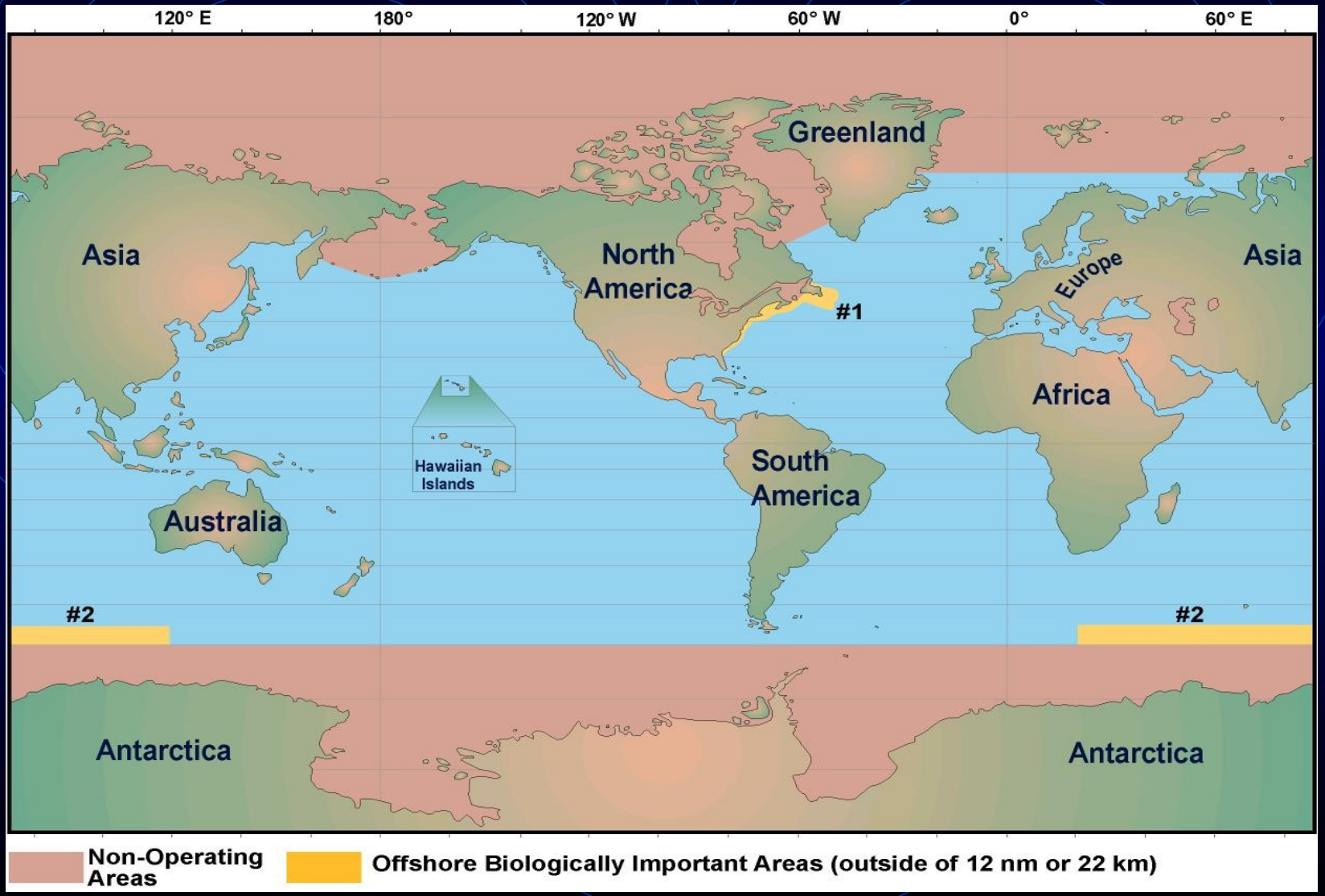
The Mitigation



Challenges in the Consultation

- The size of the action area
- An action that confounded traditional section 7 assessments
- The technical complexity of marine acoustics
- The national security issues associated with the technology
- Relating consultation on the “programmatic” action to consultation on annual missions
- The litigation risk

Action Area


120° E
180°
120° W
60° W
0°
60° E
Greenland
Asia
North America
Europe
Asia
#1
Africa
Hawaiian Islands
South America
Australia
#2
#2
Antarctica
Antarctica
Non-Operating Areas
Offshore Biologically Important Areas (outside of 12 nm or 22 km)

A “New” Assessment Approach

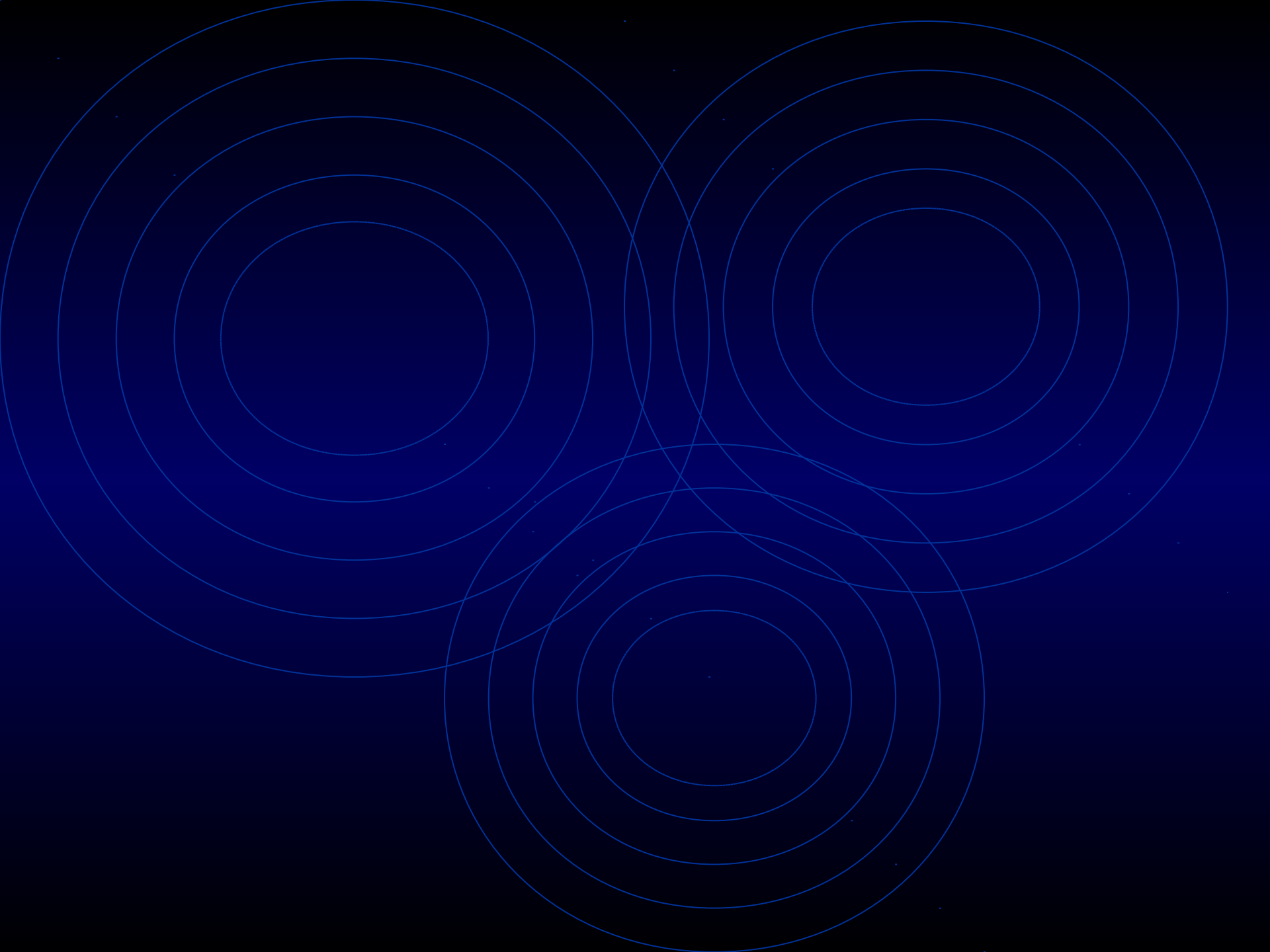
- We treated LFA transmissions as a “pollutant” in the marine environment
- Then we adapted traditional risk assessment approaches for the consultation
  - Exposure analyses
  - Response analyses
  - Risk from Action = Exposure + Response
  - Conclusions = Risk from Action given Species Status

Clear Communication

- The consultation on SURTASS LFA required a fairly technical understanding of marine acoustics and the physics of sound sources
- Although the Navy and NMFS went to great lengths to explain the technical information, some members of the public still confused important facts like
  - The difference between types of sonar
  - The difference between sound movement in air and in marine water

Lessons from the Consultation:

- Consult before we write
- Consultations can be broken into logical steps that
  - Make them more transparent,
  - Make it easier to share the work
  - Make the administrative record much stronger
- We can manage some national security issues within section 7 consultation
- Clear communication of technical issues can be a challenge



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Lesson 4: The Record is Our Shield

- We must have administrative (written) records of consultations
- The premises of our analyses must be justified, warranted, or believable
- Our analyses must be based on and consider all relevant information
- The conclusions of our Opinions should be supported by valid or cogent argument
- Our Opinions must articulate the rational connection between the facts we present and the conclusions we reach

Lesson 4: The Record is Our Shield 2

- When we complete an effects analysis, summarize our analyses in a memorandum
  - Where we looked for information (our search strategy)
  - How we evaluated the information and treated conflicting information
  - How we approached our exposure, response, and risk analyses
  - Any responses to comments submitted by the Agency and Applicant on draft opinions

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